In the District Court of the United States for the District of Massachusetts

CIVIL NO. 3683

GENERAL TRANSPORTATION COMPANY, ET AL., PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

(Filed June 18, 1946)

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree, dated March 29, 1946,[1] of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellants' complaint to set aside an order of the Interstate Commerce Commission. The Commission's order, dated November 1, 1944, authorized and approved, in a proceeding under Section 5 of the Interstate Commerce Act as amended (49 U. S. C. 5), the purchase by Beacon

[1] The Court also rendered an opinion on the same date.

Fast Freight Company, Inc., of the operating rights of Clarence L. Hardy, who held a certificate issued by the Interstate Commerce Commission on May 1, 1941, in Docket No. MC–63867, authorizing transportation of general commodities by motor vehicle, with the usual exceptions, over irregular routes, between Boston on the one hand, and, on the other, all points and places in Massachusetts. Appeal was allowed on May 21, 1946, and certain appeal papers were served on May 29, 1946.[2]

Appellees submit that the appeal presents no substantial question, and that the judgment of the District Court should be affirmed. The only question raised on appeal[3] is whether the vendor Hardy is a "carrier" within the meaning of Section 5 (2) (a) (i) requiring approval by the Commission "for any carrier, * * * to purchase, * * * the properties, or any part thereof, of another."[4] Hardy held an outstand-

[2] The papers served on that date did not include the statement required by paragraph 2 of Rule 12.

[3] Other points were urged in the court below, and are discussed in the opinion of the District Court, but error is not assigned with respect to the disposition made of these questions by the court below.

[4] Section 5 (2) (a) provides:

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or

ing unrevoked certificate issued by the Commission, when the agreement for transfer to Beacon Fast Freight Company, Inc., was made and was approved by the Commission. However, he had ceased all physical operations on or about August 15, 1942,[5] but no action was ever taken by the Commission, either upon its own initiative or upon complaint, under Section 212 (a) of the Act (49 U. S. C. 312 (a)), to revoke Hardy's certificate.[6]

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contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *"

It is provided in Section 5 (2) (b) that:

"If the Commission finds that, * * * the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, * * *"

Section 5 (4) provides:

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, * * *"

[5] Inasmuch as his traffic had consisted of distribution from the docks in Boston to various interior Massachusetts points of shipments moving from foreign countries, principally Belgium, and from points on the Pacific Coast, Hardy found that after outbreak of the European war it was not possible for him to remain in business.

[6] Section 212 (a) provides:

"Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder

The Commission's conclusion in the case at bar that Hardy was a "carrier" by virtue of his holding an unrevoked certificate, even though no physical operations were being performed thereunder, was in accordance with its decision in *Quaker City Bus Company—Purchase—Black Hawk Line, Inc.*, 38 M. C. C. 603.[7] Appellees submit that the Commission's decision, sustained by the District Court, is clearly correct. The statutory language, legislative history, and public policy show that the

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thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however*, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder."

[7] Although appellant points to Commission decisions prior to the *Quaker City* case taking a contrary view, it is well settled that courts are not concerned with the consistency or inconsistency of decisions of the Commission with prior decisions which it has rendered. *Virginian Railway Company* v. *United States*, 272 U. S. 658, 683; *Western Papermakers Chemical Company* v. *United States*, 271 U. S. 268, 271; *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775.

holder of an outstanding unrevoked certificate is to be deemed a "carrier" within the meaning of Section 5 (2) (a) of the Interstate Commerce Act as amended.

A statutory definition of the term "carrier" is furnished in Section 203 (a) (14) of the Act (49 U. S. C. 303 (a) (14)), as follows:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerie of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes.

It is clear that the holder of a certificate of public convenience and necessity issued by the Commission falls within the requirements of the above statutory definition. Possession of such a certificate is irrebuttable evidence of "holding out" to the general public as a motor carrier. The duties and obligations incident to carrier status cannot be escaped by merely failing to perform them. Mere cessation of operations does not abolish carrier status. Of course the privilege of remaining in business may be withdrawn from a carrier which is delinquent in furnishing the service covered by its certificate. Section 212 (a) of the Act (49 U. S. C. 312 (a)), however, provides a specific and exclusive method by which a certificate

may be revoked, either upon complaint or upon the Commission's own initiative, after due notice and hearing to the carrier. This is the sole mode in which a certificate may be terminated. *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465, 472.

Admittedly, however, Hardy's certificate was never cancelled in accordance with the procedure prescribed in Section 212 (a). Neither the appellants nor any other motor carriers undertook to file a complaint with a view to having the cetificate cancelled, nor did the Commission take any action on its own motion. The conclusion is therefore inevitable that Hardy's certificate remained in full force and effect. To deny the holder of a certificate remaining in full force and effect the right to transfer, with Commission approval, his operating authority to a purchaser would be tantamount to a partial revocation of the certificate in a manner other than that authorized by law. There is no warrant in the statute for the distinction appellants undertake to assert, which would permit Hardy to resume operations himself but would prohibit him from transferring his operating rights to a purchaser. It is impossible to see how the *jus disponendi* could be extinguished, while the right of the original operator to resume operations remains alive.

In this connection it is important to remember that the case at bar involves only a proceeding for the transfer of an existing certificate. Apart from the revocation procedure established under

Section 212 (a) the statute imposes no requirement of continuity of operation.[4]

Accordingly, it is submitted that under the plain terms of the pertinent statutory provisions, the Commission was correct in concluding that Hardy was to be deemed a "carrier" within the meaning of Section 5, and in taking jurisdiction of the application and approving the transfer.

Moreover, the legislative history of Section 5 of the Interstate Commerce Act demonstrates that the section should be given a broad and inclusive interpretation so as to effectuate the public policy of bringing all mergers, transfers, and unifications within the supervisory jurisdiction of the Interstate Commerce Commission.

If appellants' interpretation were accepted, and the conclusion reached that a transaction of the sort involved here is not within the Commission's supervisory jurisdiction, carriers would be free to embark upon gigantic schemes of merger and consolidation, without restraint. They would not need to subject their plans to scrutiny and approval by the Commission. All that would be necessary in order to escape the Commission's

[4] In this respect the distinction is clear between the present case and one arising in connection with the issuance of a certificate under the "grandfather clause" of Section 206 (a) of the Act (49 U. S. C. 306 (a)), where continuity of substantial service is essential. *Gregg Cartage & Storage Company* v. *United States*, 316 U. S. 74, 78; *Alton Railroad Company* v. *United States*, 315 U. S. 15, 21, 25; *Shawmut Transportation Company* v. *United States*, 49 F. Supp. 831 (D. Mass., 1943).

oversight and control, insofar as the acquisition of operating rights was not essential to a proposed transaction, would be for the carriers to be acquired to cease operation prior to the consummation of the transaction. Thereupon, according to appellants' reasoning, the carrier enterprise would cease to be a carrier and it or its assets could be included in a merger or acquisition program without the necessity of obtaining the Commission's approval.[9] Obviously an interpretation of Section 5 which would leave such a loophole for evasion is contrary to the public policy embodied in Section 5. This becomes evident upon a review of the legislative history of that section.

In the original Interstate Commerce Act of 1887 Section 5 was an anti-pooling provision,[10] which may be regarded as a precursor of the broader prohibitions contained in the Sherman Antitrust Act which became law three years later.[11]

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[9] Another absurdity which would result from appellants' interpretation of Section 5 is that it would result in exemption from the requirement of Commission approval if more than 20 vehicles were involved; whereas, under the decision in *United States* v. *Resler*, 313 U. S. 57, Commission approval would be required for a transaction involving less than 20 vehicles, and hence not subject to the provisions of Section 5.

[10] Act to regulate commerce, February 4, 1887, 24 Stat. 379, 380.

[11] Sherman Act of July 2, 1890, 26 Stat. 209. In a textbook by William L. Snyder, *The Interstate Commerce Act and Federal Anti-Trust Laws*, 1904, 121–22, the author points

These restraints were relaxed by the Transportation Act of 1920.[12] Section 5 was amended so as to permit pooling upon specific approval by order of the Commission. Upon similar approval acquisitions under lease or by the purchase of stock or in any other manner not involving consolidation into a single system were made lawful. Consolidation was also permitted, subject to certain conditions requiring that the proposed consolidation be in harmony with the general plan for railroad consolidations to be prepared by the Commission.

The Emergency Transportation Act of 1933 again amended Section 5.[13] The distinction between "acquisition of control" and "consolidation into a single system" was eliminated, and a single procedure was established for dealing with the several methods of unification. A provision was added specifically prohibiting "control or management in a common interest" in whatever manner effected, except as provided in Section 5.[14]

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out that: "The Sherman Act, with reference to the Commerce Act, is practically supplemental legislation. Its effect and operation is to broaden the provisions of Section 5 so as to embrace not only carriers, but manufacturers and producers as well."

[12] 41 Stat. 456, 480.

[13] 48 Stat. 211, 217.

[14] In the *Nickel Plate case*, 79 I. C. C. 581, the Commission had held (Commissioner Eastman dissenting) that its approval was not necessary, under Section 5 as amended by the Transportation Act of 1920, for a merger not violative of the

When motor carriers were brought under regulation in 1935, Section 213 (a) of the Motor Carrier Act[15] provided a scheme of Commission control of unification patterned after Section 5.

The Transportation Act of 1940 amended Section 5, so as to make it applicable to rail, motor and water carriers.[16] At the same time the Commission's authority was broadened by the insertion of the words "or otherwise" after the provisions relating to control "through ownership of stock." (See 322 U. S. at 38–39.)

These successive changes and amendments in the language of Section 5 of the Act indicate a clear and increasing intent on the part of Congress to bring all carrier unifications within the jurisdiction and supervision of the Interstate Commerce Commission. It would be manifestly contrary to the legislative policy for an interpretation to be adopted which would exempt unification transactions from the requirement of Commission approval. A construction of Section 5 which would minimize, instead of extending, the scope of the Commission's jurisdiction would be contrary to the entire history and purpose of Section 5.

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antitrust laws, but that the consolidation might be effected under state law. *Snyder* v. *N. Y., C. & St. L. R. Co.*, 118 Ohio St. 72, 85 (1928); aff'd 278 U. S. 578.

[15] 49 Stat. 543, 555.

[16] 54 Stat. 898, 905. Section 213 (a) of the Motor Carrier Act was accordingly repealed.

Judicial construction of Section 5 leads to the same conclusion. In *United States* v. *Marshall Transport Company,* 322 U. S. 31, the Supreme Court, reversing a divided district court of three judges, adopted an interpretation of Section 5 which gave effect to its primary purpose of extending, rather than limiting, the scope of the Commission's jurisdiction. In that case a motor carrier (Refiners), which was wholly owned by a non-carrier (Union Tank Car Company), was seeking to acquire the property and business of another carrier (Marshall). This was an application "for any carrier * * * to purchase * * * the properties * * * of another" and therefore could apparently be approved by the Commission under the quoted provision of Section 5 (2) (a). But another provision of that section applies to applications "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier"; and the contention was advanced that as a result of the proposed transaction Union (the non-carrier) already controlling one carrier (Refiners) would obtain control of Marshall, and that such a result was not permissible without an application by Union for the Commission's authority to acquire such control. The Court upheld that contention.

The opinion of the Court, speaking through the late Chief Justice (see 322 U. S. at 36–37), clearly indicates that Section 5 should not be given a

"narrow" construction. The Court adopted an interpretation giving full effect to the policy of Congress that all carrier unifications should be subject to the scrutiny and supervision of the Commission.

A reading of Section 5, such as appellants advance, which would exempt carrier unifications from the requirement of obtaining Commission approval, and which would encourage evasions by the simple stratagem of causing the carriers to be acquired to cease operation, is thus clearly contrary to the public policy embodied in Section 5 as demonstrated by the legislative history of that section as well as the judicial construction placed upon it. Such an interpretation also conflicts with the plain meaning of the language used by the Congress.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

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